In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 983

HUDSON TRANSIT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 429 F. 2d 1223. The Board's decision and order (Pet. App. 22a-55a) are reported at 173 NLRB No. 13.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on August 21, 1970. The peti-

tion for a writ of certiorari was filed on November 19, 1970. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company had not established a legitimate and substantial business justification for reducing wages and eliminating certain fringe benefits during the pendency of a Board representation proceeding, thereby restraining its employees in the exercise of their right to select a bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Since 1950, the Company—which operates a public bus service in a resort area and caters primarily to summer vacationers—has had successive bargaining contracts with the Transport Workers Union ("TWU"). These agreements all had beginning and expiration dates in early January. The January date was advantageous to the Company because it assured that negotiations would occur during a time when the Company was operating at a loss, and was therefore

in a better position to withstand a strike. (Pet. App. 24a; R. 34-35, 43.)[1]

In October 1966, the Company and TWU commenced negotiations for a new contract. The negotiations were halted, however, when the Independent Bus Transit Union ("IBTU") filed a petition with the Board, seeking a representation election among the Company's employees. (Pet. App. 25.) On November 10, the Company's attorney offered to consent to an election, stating that, since the Company "counted on the summer revenues to offset" its losses during the balance of the year, it was anxious to have the election as soon as possible (Pet. App. 25a-26a; R. 24-25). Since the two unions could not come to an agreement on the election details, however, it was necessary to hold a formal hearing on November 15. During discussions that day, Company counsel again indicated that the Company desired a quick disposition of the representation issue because its contract with TWU expired on January 15 and it needed to know where it was "going for the summer months." (Pet. App. 26a; R. 25-26.)

In the election held on January 9, 1967, TWU received 104 votes, IBTU received 99, 2 votes were cast for neither, and 9 ballots were challenged. Upon learning that it would take at least a month for the

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[1] Traditionally, the Company's operating expenses exceed income during the first, second, and fourth quarters; during the third quarter, July 1 to September 30, it recoups these losses and makes a profit (R. 35, 48-49, 113-114). ("R." references are to the joint appendix to the briefs filed in the court below.)

Board to resolve the challenges and the objections which IBTU planned to file, Company President Flateman "was just beside [himself]." He informed the unions that "certain economic adjustments" would have to be made. (Pet. App. 27a; R. 29-30.) On January 13, the Company issued the following notice to its employees, who had been hearing rumors that "adjustments" would go into effect on January 16, the day after the current contract expired (Pet. App. 28a; R. 31-32, 106):

NOTICE

TO ALL EMPLOYEES:

In view of the uncertainties of the present situation the Company has been placed in a position making economies necessary.

However, to avoid, if possible, any hardships on our employees, the Company will postpone such economies until Sunday, February 5, 1967.

It is our hope that by that time the present uncertainty will be resolved and a new contract mutually agreed upon.

On February 2, in a letter to all officers and employees, President Flateman stated that, since the question of which union would represent the employees had not yet been resolved and the Company thus had no assurance that it would be in operation during the "critical summer months," it was, as of February 5, effecting the following "operating economies":

1. Elimination of Company contributions to Blue Cross, Blue Shield, Major Medical and Life Insurance Programs. Those interested in con-

tinuing such coverage must authorize the company on the enclosed form to deduct from wages the amount of such premiums.

2. A reduction of 10% of gross wages of all employees whose gross weekly wages exceed $100.00. This reduction will not reduce such gross wages to an amount less than $100.00, for a full week's work.
3. Elimination of all accruals for vacations and paid holidays. [Pet. App. 28a; R. 98-99.]

On February 5, over the protest of TWU, the Company put these changes into effect (Pet. App. 30a; R. 8-9).

On March 31, 1967, the Board, after overruling IBTU's objections to the election and resolving the challenged ballot issues, certified that TWU was still the representative of the Company's employees (Pet. App. 30a-31a, n. 7). The Company and TWU resumed contract negotiations on April 7, and TWU demanded that the Company restore the reductions in wage and other benefits retroactive to the date when they were instituted (Pet. App. 31a; R. 9, 33). The Company offered to do so if TWU would agree to make the effective date of the new contract retroactive to January (Pet. App. 31a; R. 35, 70). TWU refused, proposing, instead, that the contract be effective as of the date negotiations were completed (Pet. App. 32a; R. 34).

On April 22, the parties arrived at a renewal contract which was effective as of March 31, the date of TWU's certification. The new contract restored the vacations and paid holidays as of February 5,

when they were eliminated. However, the other reductions—the 10 percent pay cut and the elimination of the Company's contributions for health and life insurance—were restored only as of March 31, the effective date of the new contract. (Pet. App. 32a; R. 100-105.)

B. The Decisions Below

The Board found that the Company, by threatening to reduce the wages and other benefits of its employees, and by actually so doing, while a representation proceeding was pending, interfered with the employees' right to select a bargaining representative. The Board reasoned that, "[s]ince it was out of this proceeding that [the Company's] conduct flowed, the employees would tend to think twice before again engaging in a representation proceeding" (Pet. App. 37a). Moreover, such action "would tend * * * to alienate the employees from the labor organization that accounted for the proceeding that brought on the travail,—the petitioning IBTU" (Pet. App. 38a). The Board further found that, even accepting the Company's contention that the reductions made in February were an economic hedge against a possible strike in June or July,[2] that possibility was so tenuous and speculative that it did not constitute a legiti-

[2] The Board found that the primary reason for the Company's reduction in benefits was not to provide an economic hedge against a possible summer strike, but rather to give the Company leverage in the impending negotiations for obtaining a January starting and termination date for the contract (Pet. App. 47a).

mate and substantial business justification which justified the Company's impairment of its employees' right freely to select a bargaining representative (Pet. App. 40a-42a, 46a).[3] The Board concluded that the Company's action violated Section 8(a)(1) of the Act (Pet. App. 49a-50a, 54a, n. 2), and ordered it to make whole all employees for the losses sustained, and to post the customary notices (Pet. App. 50a-53a, 55a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-19a).

ARGUMENT

In *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378, this Court reemphasized the principle that, where an employer engages in conduct which tends to interfere with the exercise of his employees' Section 7 rights, "he is guilty

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[3] As the Board pointed out (Pet. App. 40a):

> * * * a strike presupposes negotiations in which the parties have fallen apart. It is not an event which is self-creating because summer is coming or has arrived. There was every reason to expect in view of the nature of [the] initial tally on January 9 * * * that there would be a collective-bargaining representative determined and that negotiations would begin reasonably before the summer—as indeed happened. Respondent, in making the reductions on the basis of the "possibility" of a strike in the summer was thus projecting itself into the following sequence: (a) the bargaining representative would present its demands, (b) Respondent would deem them unacceptable, (c) the bargaining representative instead of yielding and trying to reach an accommodation will strike, —and there would go our summer revenues * * *.

of an unfair labor practice" unless he "can show that his action was due to 'legitimate and substantial business justifications,'" quoting from *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 34. Petitioner does not appear to contest the Board's finding, approved by the court below, that its action in reducing wages and other employee benefits during the pendency of a representation proceeding tended to restrain the employees in the exercise of their Section 7 right freely to select a bargaining representative. Its basic contention is that the Board erred in concluding that it failed to establish a legitimate and substantial business justification for its action. This issue turns on the facts of the particular case, and does not warrant review by this Court.

Moreover, as the Court added in *Fleetwood*, *supra*, it "is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" Since the possibility of a strike in July or August was remote and speculative in February when the Company reduced employee benefits (see n. 3, *supra*), the Board reasonably concluded that, even if the Company was motivated by a desire to protect itself against economic losses caused by a strike, as it claimed (but see n. 2, *supra*), that was not, in the circumstances here, a business justification sufficient to justify the impairment of employee rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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